

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

Sylvester Brown,)	3:07-CV-308-ECR-VPC
)	
Plaintiff,)	
)	
vs.)	<u>Order</u>
)	
TA OPERATING LLC D.B.A. TRAVEL)	
CENTERS OF AMERICA, ET AL,)	
)	
Defendants.)	
)	
)	

This case arises out of the termination of Plaintiff Sylvester Brown from Defendant TA Operating LLC d.b.a. Travel Centers of America ("Travel Centers"). Plaintiff alleges that he was terminated because of his race. Now pending is Defendant's motion for summary judgment (#62).

The motion is ripe, and we now rule on it.

I. Factual and Procedural Background

Plaintiff is a black male who was discharged on November 14, 2003, from his position as manager of a Sparks, Nevada restaurant owned by Defendant. (P.'s Opp at 2 (#63).) Plaintiff was discharged after a large discrepancy between the actual and reported inventory was discovered. (See id.) At the time of his discharge Plaintiff had worked for Defendant for less than six months. (Id.) Plaintiff alleges that he was fired because of his race. Specifically, he contends that Keith O'Dell, the site manager, used

1 inventory errors as a pretext to terminate Plaintiff. (P.'s Opp. at
2 2 (#63).)

3 On July 9, 2007, Plaintiff filed the complaint (#1) in the
4 present lawsuit. On November 7, 2008, Plaintiff filed an amended
5 complaint (#24). On February 24, 2010, Defendant filed a motion for
6 summary judgment (#62). Plaintiff opposed (#63) the motion, and
7 Defendant replied (#64).

8 9 **II. Motion for Summary Judgment Standard**

10 Summary judgment allows courts to avoid unnecessary trials
11 where no material factual dispute exists. N.W. Motorcycle Ass'n v.
12 U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The court
13 must view the evidence and the inferences arising therefrom in the
14 light most favorable to the nonmoving party, Bagdadi v. Nazar, 84
15 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment
16 where no genuine issues of material fact remain in dispute and the
17 moving party is entitled to judgment as a matter of law. Fed. R.
18 Civ. P. 56(c). Judgment as a matter of law is appropriate where
19 there is no legally sufficient evidentiary basis for a reasonable
20 jury to find for the nonmoving party. FED. R. CIV. P. 50(a). Where
21 reasonable minds could differ on the material facts at issue,
22 however, summary judgment should not be granted. Warren v. City of
23 Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct.
24 1261 (1996).

25 The moving party bears the burden of informing the court of the
26 basis for its motion, together with evidence demonstrating the
27 absence of any genuine issue of material fact. Celotex Corp. v.

1 Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met
2 its burden, the party opposing the motion may not rest upon mere
3 allegations or denials in the pleadings, but must set forth specific
4 facts showing that there exists a genuine issue for trial. Anderson
5 v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the
6 parties may submit evidence in an inadmissible form - namely,
7 depositions, admissions, interrogatory answers, and affidavits -
8 only evidence which might be admissible at trial may be considered
9 by a trial court in ruling on a motion for summary judgment. FED.
10 R. Civ. P. 56(c); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179,
11 1181 (9th Cir. 1988).

12 In deciding whether to grant summary judgment, a court must
13 take three necessary steps: (1) it must determine whether a fact is
14 material; (2) it must determine whether there exists a genuine issue
15 for the trier of fact, as determined by the documents submitted to
16 the court; and (3) it must consider that evidence in light of the
17 appropriate standard of proof. Anderson, 477 U.S. at 248. Summary
18 judgment is not proper if material factual issues exist for trial.
19 B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir.
20 1999). "As to materiality, only disputes over facts that might
21 affect the outcome of the suit under the governing law will properly
22 preclude the entry of summary judgment." Anderson, 477 U.S. at 248.
23 Disputes over irrelevant or unnecessary facts should not be
24 considered. Id. Where there is a complete failure of proof on an
25 essential element of the nonmoving party's case, all other facts
26 become immaterial, and the moving party is entitled to judgment as a
27 matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a
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1 disfavored procedural shortcut, but rather an integral part of the
2 federal rules as a whole. Id.

3 4 III. Discussion

5 Plaintiff asserts that he has been the victim of purposeful
6 discrimination. Specifically, Plaintiff alleges that he was
7 terminated because of his race in violation of 42 U.S.C.
8 § 1981 and Title VII of the Civil Rights Act of 1967, 42 U.S.C. §§
9 2000(e)-2000(e)-17 (1982) ("Title VII").

10 A. Title VII Statute of Limitations

11 A Title VII claimant is authorized to file suit only if the
12 claimant has filed a timely charge of discrimination with the Equal
13 Employment Opportunity Commission ("EEOC") or appropriate state
14 agency and obtained a right-to-sue-letter. 42 U.S.C. §§ 2000e-5(e),
15 (f); Sommatino v. United States, 255 F.3d 704, 708-09 (9th Cir.
16 2001). Such a suit must be commenced not more than ninety days
17 after receipt of the right-to-sue-letter. 42 U.S.C. §
18 2000e-5(f)(1); Payan v. Aramark Mgmt. Servs. Ltd. P'ship, 495 F.3d
19 1119, 1121 (9th Cir. 2007) ("If a litigant does not file suit within
20 ninety days '[of] the date EEOC dismisses a claim,' then the action
21 is time-barred."). There exists a rebuttable presumption that a
22 claimant received the right-to-sue letter within three days of the
23 EEOC's issuance of the letter. Payan, 495 F.3d at 1125.

24 In this case, Plaintiff filed his charge of discrimination with
25 the Nevada Equal Rights Commission ("NERC"). (P.'s Opp. at 2
26 (#63).) On January 20, 2004, Shannon Bryant – Plaintiff's former
27 attorney – sent NERC a letter informing them that Mr. Bryant was the

1 attorney of record for Plaintiff. (P.'s Opp., Ex. 4 (#63-4).) On
2 January 11, 2006, NERC sent a letter to Mr. Bryant informing him
3 that NERC was closing its file. (Id., Ex. 7.) On September 27,
4 2006, however, the EEOC sent Plaintiff's right-to-sue letter to the
5 address listed on Plaintiff's original filing, not to Mr. Bryant.
6 (Id., Ex. 9.) Plaintiff was no longer living at that address and
7 had moved to Florida. (Id.) There is evidence in the record that
8 Plaintiff filed a change of address form at the post office when he
9 moved to Florida, and received his forwarded mail. (Dep. of Brown
10 69:23-70:1 (#63-1).) There is no evidence either that Plaintiff's
11 right-to-sue letter was returned to the EEOC as undeliverable or
12 that Plaintiff informed the EEOC that he had moved. Plaintiff did
13 not file the present lawsuit until July 9, 2007 – more than nine
14 months after the EEOC sent the original right-to-sue letter and more
15 than six months after the ninety-day filing period expired.
16 Plaintiff's current counsel has sought and obtained another right-
17 to-sue letter from the EEOC. (Id., Exs. 11-13.) The existence of a
18 second right-to-sue letter, however, does not lift the statute of
19 limitations bar created by the first letter.

20 Plaintiff argues that his failure to file within ninety days
21 should be excused under the doctrine of equitable tolling. The
22 applicable ninety-day filing period is subject to equitable tolling,
23 but equitable tolling is "to be applied only sparingly and courts
24 have been generally unforgiving when a late filing is due to
25 claimant's failure to exercise due diligence in preserving his legal
26 rights." Nelmida v. Shelly Eurocars, Inc., 112 F.3d 380, 384 (9th
27 Cir. 1997) (internal ellipses, quotation marks and citations
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1 omitted). In Nelmida, the Ninth Circuit cited with approval Hill v.
2 John Chezik Imports, 869 F.2d 1122 (8th Cir. 1989): "the Eighth
3 Circuit refused to equitably toll the ninety-day period where the
4 claimant had not informed the EEOC of a change of address. The EEOC
5 had sent the right-to-sue letter to the address it had on record,
6 but the claimant never received it because she had moved. The court
7 held that the claimant received constructive notice when the
8 right-to-sue letter was sent to her old address, and that equitable
9 tolling was not appropriate because the claimant had failed to
10 notify the EEOC of her new address." Nelmida, 112 F.3d at 384 (9th
11 Cir. 1997) (citing Hill, 869 F.2d 1122, 1123-24).

12 The Hill case is factually distinguishable from this case.
13 Like the Plaintiff in Hill, Plaintiff moved and failed to notify the
14 EEOC of his new address. However, unlike the Plaintiff in Hill,
15 Plaintiff, in this case, had an attorney to whom the EEOC could and
16 should have sent the letter. Therefore, Plaintiff's Title VII claim
17 would be subject to equitable tolling. Nevertheless, we cannot toll
18 Plaintiff's claim. Plaintiff has not provided us with the second
19 right-to-sue letter. Therefore we do not have a date to which we
20 can toll the applicable statute of limitations. Regardless, as
21 discussed below, Plaintiff's Title VII claim fails on the merits.

22 Plaintiff's section 1981 claim is governed by the four-year
23 statute of limitations set forth in 28 U.S .C. § 1658(a). See
24 Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d
25 1053, 1061 (9th Cir. 2004). We now turn to Plaintiff's section 1981
26 claim. We note that "those legal principles guiding a court in a
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1 Title VII dispute apply with equal force in a § 1981 action."
2 Manatt v. Bank of Am., NA, 339 F.3d 792, 797 (9th Cir. 2003).

3 B. Analytic Framework

4 The analytic framework used in Title VII cases also applies to
5 purposeful discrimination claims under section 1981. See St. Mary's
6 Honor Center v. Hicks, 509 U.S. 502, 506 n.1 (1993). Title VII
7 makes it unlawful for an employer to "discriminate against any
8 individual with respect to his compensation, terms, conditions, or
9 privileges of employment, because of such individual's race"
10 42 U.S.C. § 2000e-2(a)(1). A plaintiff may establish a prima facie
11 case under Title VII either by meeting the four-part test laid out
12 in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), or by
13 providing direct or indirect evidence suggesting that the employment
14 decision was based on an impermissible criterion. Metoyer, 504 F.3d
15 919, 931 (9th Cir. 2007) ("When responding to a summary judgment
16 motion . . . [the plaintiff] may proceed using the McDonnell Douglas
17 framework, or alternatively, may simply produce direct or
18 circumstantial evidence demonstrating that a discriminatory reason
19 more likely than not motivated [the employer].") (citation omitted)
20 (alterations in original). "When the plaintiff offers direct
21 evidence of discriminatory motive, a triable issue as to the actual
22 motivation of the employer is created even if the evidence is not
23 substantial." Id.

24 To establish a prima facie case under the McDonnell Douglas
25 framework a plaintiff must offer proof: "(1) that the plaintiff
26 belongs to a class of persons protected by Title VII; (2) that the
27 plaintiff performed his or her job satisfactorily; (3) that the

1 plaintiff suffered an adverse employment action; and (4) that the
2 plaintiff's employer treated the plaintiff differently than a
3 similarly situated employee who does not belong to the same
4 protected class as the plaintiff." Cornwell v. Electra Cent. Credit
5 Union, 439 F.3d 1018, 1028 (9th Cir. 2006) (citing McDonnell Douglas
6 Corp., 411 U.S. at 802).

7 Establishing a prima facie case creates a presumption that the
8 plaintiff's employer undertook the challenged employment action
9 because of the plaintiff's race. Id. To rebut this presumption,
10 the defendant must produce admissible evidence showing that the
11 defendant undertook the challenged employment action for a
12 "legitimate, nondiscriminatory reason." Id. If the defendant does
13 so, then the plaintiff must then show that the articulated reason is
14 pretextual. Id. A plaintiff may demonstrate pretext by offering
15 "evidence, direct or circumstantial, that a discriminatory reason
16 more likely motivated the employer to make the challenged employment
17 decision." Davis v. Team Elec. Co., 520 F.3d 1080, 1091 (9th Cir.
18 2008). Alternatively, an employee may offer evidence "that the
19 employer's proffered explanation is unworthy of credence." Id.

20 1. Direct Evidence

21 "Direct evidence is evidence which, if believed, proves the
22 fact of discriminatory animus without inference or presumption."
23 Vasquez v. County of Los Angeles, 349 F.3d 634, 640 (9th Cir.
24 2003) (internal citation and quotation marks omitted). Brown
25 contends that summary judgment must be denied because there is
26 direct evidence of racial animus on the part of O'Dell. We
27 disagree. Brown offers no evidence which could be considered

1 "direct evidence." Brown's evidence consists of remarks that O'Dell
2 made. There is substantial evidence, however, demonstrating that
3 O'Dell was not the ultimate decisionmaker in this case. Indeed,
4 though it appears O'Dell took part in the decision to terminate, he
5 could not have terminated Brown had French or Millensifier disagreed
6 with the decision to terminate. (Dep. of O'Dell 66:1-9 (#62-2).)
7 The record indicates that Kirk French, the District Manager,
8 instructed O'Dell to terminate Plaintiff following an investigation
9 into the inventory disparity conducted on November 12, 2003, by Jim
10 Millensifer ("Millensifer"), a restaurant specialist. (Sparks Fill
11 Serve Restaurant Margin Investigation (#62-4)); (Dec. Of Kirk French
12 ¶ 15 (#62-4).) Brown has offered no evidence of discriminatory
13 remarks made by French or Millensifer. See Vasquez, 349 F.3d at 640
14 (refusing to find that discriminatory remarks constituted direct
15 evidence absent a "nexus" between subordinate's discriminatory
16 remarks and superior's subsequent employment decisions). See also
17 Willis v. Marion County Auditor's Office, 118 F.3d 542, 548 (7th
18 Cir. 1997) (refusing to impute racial bias of subordinates who
19 reported rule violation to superior because superior did her own
20 independent investigation); Long v. Eastfield Coll., 88 F.3d 300,
21 306-07 (5th Cir. 1996) (noting that, if final decisionmaker based
22 decision on independent investigation, causal link between
23 subordinate's retaliatory motive and plaintiff's termination would
24 be broken).

25 Brown has no direct evidence of discriminatory motive and thus
26 must proceed under the McDonnell Douglas framework. See Enlow v.
27 Salem-Keizer Yellow Cab Co., Inc, 389 F.3d 802, 810 (9th Cir.

1 2004) (ADEA case) ("When a plaintiff alleges disparate treatment based
2 on direct evidence . . . we do not apply the burden-shifting
3 analysis")

4 2. McDonnell Douglas Framework

5 In this case, Plaintiff has not made a prima facie case for
6 discrimination because he has not demonstrated that a similarly
7 situated person of another race was treated differently. The
8 requirement that a similarly situated member of another race was
9 treated differently can be satisfied, in the discriminatory
10 discharge context by showing that the Plaintiff was "replaced by an
11 employee outside [his] protected class with equal or inferior
12 qualifications." Lobster v. Sierra Pac. Power Co., 12 F. Supp. 2d
13 1105, 1112 (D. Nev. 1998). In this case there is no admissible
14 evidence pertaining to who replaced Plaintiff or the caliber of his
15 or her qualifications. We note that the NERC Investigative Report
16 indicates that Plaintiff reported to the NERC investigator that he
17 was replaced by a white woman named Suzette Smith. (Investigative
18 Report, Ex. 6 (#63-6).) This finding of fact appears to be based on
19 inadmissible hearsay. Regardless, neither party has brought to our
20 attention any evidence – admissible or otherwise – regarding
21 Suzette's Smith's qualifications.

22 Even if Plaintiff had made prima facie case, however,
23 Defendants have produced a substantial amount of admissible
24 evidence showing that they undertook the challenged employment
25 action for a "legitimate, nondiscriminatory reason." See Cornwell,
26 439 F.3d at 1028. Specifically, there is overwhelming evidence
27 Plaintiff was discharged because it was discovered that there was a
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1 discrepancy of around \$7,000.00 between the reported and actual
2 inventory of his restaurant. (See Dep. of Brown 34:10-35:35 (#62-
3 2).)

4 Plaintiff has, moreover, failed to produce enough evidence to
5 allow a reasonable fact-finder to conclude either 1) that the
6 employer's explanation is false, or 2) that the true reason for the
7 employment action was a discriminatory one. See Nidds, 113 F.3d at
8 918 n.2. "Where the evidence of pretext is circumstantial, rather
9 than direct, the plaintiff must present specific and substantial
10 facts showing that there is a genuine issue for trial. However,
11 that requirement is tempered by our observation that, in the context
12 of Title VII claims, the burden on plaintiffs to raise a triable
13 issue of fact as to pretext is hardly an onerous one." Noyes v.
14 Kelly Services, 488 F.3d 1163, 1170 (9th Cir. 2007).

15 Plaintiff argues that pretext can be shown because "the
16 inventory of the store was always off prior to Plaintiff commencing
17 his employment with Defendant, and that such inventory was under the
18 control of Mr. O'Dell. Furthermore, Plaintiff testified that any
19 inventory he conducted was either with Mr. O'Dell being present or
20 subject to Mr. O'Dell's review. Therefore, to claim that Plaintiff
21 somehow himself altered the inventory numbers is absurd without Mr.
22 O'Dell's cooperation." (P.'s Opp. at 11 (#63).)

23 Assuming it is true that O'Dell was jointly or even primarily
24 responsible for the inventory shortage, Plaintiff has still not
25 demonstrated that Defendant's nondiscriminatory reasons are
26 "unworthy of credence." Davis, 520 F.3d at 1091. The record
27 indicates that Kirk French, the District Manager, decided to
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1 terminate Plaintiff following an on-site investigation into the
2 inventory shortage. (Sparks Fill Serve Restaurant Margin
3 Investigation (#62-4)); (Dec. Of Kirk French ¶ 15 (#62-4).) Though
4 it may have been wiser to terminate O'Dell or to terminate both
5 O'Dell and Plaintiff, "[c]ourts have consistently held that they
6 should not second guess an employer's exercise of its business
7 judgment in making personnel decisions, as long as they are not
8 discriminatory." E.E.O.C. v. Republic Servs., Inc., 640 F. Supp. 2d
9 1267, 1313 (D. Nev. 2009). Defendant's apparent belief that the
10 inventory discrepancy was due to Plaintiff's performance, and not
11 O'Dell's, even if mistaken, is not grounds for inferring
12 discrimination.

13 In addition, we note that Defendant's stated reasons for
14 terminating Plaintiff are consistent with their actions. Plaintiff
15 was terminated within two days of the investigation into the
16 inventory discrepancies.

17 C. Hostile Work Environment

18 Plaintiff contends he was subjected to a hostile work environment as
19 a result of the race-based harassment on the part of O'Dell. (P.'s Opp.
20 at 11 (#63).) Defendant contends that Plaintiff's workplace was not
21 objectively abusive or legally hostile. (Mot. for SJ at 11 (#62).)

22 To prevail on a hostile workplace claim premised on race, a
23 plaintiff must show: "(1) that he was subjected to verbal or physical
24 conduct of a racial nature; (2) that the conduct was unwelcome; and (3)
25 that the conduct was sufficiently severe or pervasive to alter the
26 conditions of the plaintiff's employment and create an abusive work
27 environment." Vasquez, 349 F.3d at 642. "To determine whether conduct

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1 was sufficiently severe or pervasive . . . we look at all the
2 circumstances, including the frequency of the discriminatory
3 conduct; its severity; whether it is physically threatening or
4 humiliating, or a mere offensive utterance; and whether it
5 unreasonably interferes with an employee's work performance." Id.
6 (Internal citation and quotation marks omitted).

7 Plaintiff alleges that O'Dell made several comments directed to
8 him, such as, "Is that your pen leaking or is it your true color
9 showing through" and "I didn't see you sitting there in the dark."
10 (P.'s Opp. at 4 (#63).) The latter comment was made when Plaintiff
11 was sitting in a well-lit dining room. Brenda Knight, a former
12 employee of Defendant, also testified that O'Dell used the word
13 "nigger" to refer to black people on various occasions, but never
14 said it to Plaintiff's face. (Dep. of Knight 14:1-23 (#63-14).)

15 When compared to other hostile work environment cases, the
16 events in this case are not severe or pervasive enough to constitute
17 a hostile work environment. In Sanchez v. City of Santa Ana, 936
18 F.2d 1027 (9th Cir. 1990), the court upheld a directed verdict on
19 the plaintiff's hostile work environment claim, despite allegations
20 that the employer posted a racially offensive cartoon, made racially
21 offensive slurs, targeted Latinos when enforcing rules, provided
22 unsafe vehicles to Latinos, did not provide adequate police backup
23 to Latino officers, and kept illegal personnel files on plaintiffs
24 because they were Latino. Id. at 1037. Similarly, in Kortan v.
25 Cal, Youth Auth., 217 F.3d 1104 (9th Cir. 2000), the Ninth Circuit
26 held that there was no hostile work environment when a supervisor
27 called female employees "castrating bitches," "Madonnas," or

1 "Regina" on several occasions in plaintiff's presence; the
2 supervisor called the plaintiff "Medea"; the plaintiff complained
3 about other difficulties with that supervisor; and the plaintiff
4 received letters at home from the supervisor. The court held that,
5 while the supervisor's language was offensive, his conduct was not
6 severe or pervasive enough to unreasonably interfere with the
7 plaintiff's employment. Id. at 1111.

8 Though O'Dell's alleged behavior is regrettable, it was also
9 infrequent, not physically threatening and there is no indication it
10 interfered with his work performance. As such, we conclude that
11 Plaintiff was not subjected to a hostile work environment.

12 13 **V. Conclusion**

14 Plaintiff has not come forth with direct evidence of
15 discrimination. Therefore, we evaluate his claim under the
16 McDonnell Douglas burden shifting framework. Plaintiff has not made
17 a prima facie case of discrimination: There is no evidence on the
18 record that a similarly situated member of another race was treated
19 differently. Regardless, Defendant has satisfied its burden of
20 production and produced admissible evidence showing that it
21 undertook the challenged employment action for a legitimate,
22 nondiscriminatory reason. Plaintiff, in turn, has failed to produce
23 evidence sufficient to allow a reasonable fact-finder to conclude
24 either that Defendant's explanation is false, or that the true
25 reason for the employment action was a discriminatory one.
26 Therefore, summary judgment in favor of Defendants is appropriate.

1 IT IS, THEREFORE, HEREBY ORDERED that Defendants' motion for summary
2 judgment (#62) is granted.

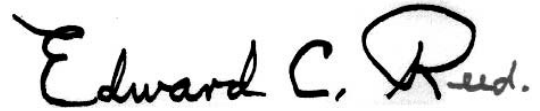
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4 The Clerk shall enter judgment accordingly.

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6 DATED: April 23, 2010.

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A handwritten signature in black ink, reading "Edward C. Reed." The signature is written in a cursive style with a large, looped "R" and a period at the end.

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UNITED STATES DISTRICT JUDGE

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